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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- 65979; File No. SR-C2-2011-031)

December 15, 2011

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Order Granting Approval to a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Concerning Industry Directors and the Nomination of Representative Directors

I. Introduction

On October 21, 2011, the C2 Options Exchange, Incorporated (“Exchange” or “C2”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend its Bylaws concerning Industry Directors and the nomination of Representative Directors and to make conforming changes to the C2 Certificate of Incorporation and the Voting Agreement between C2 and CBOE Holdings, Inc. (“CBOE Holdings”). On November 1, 2011, the Exchange submitted a technical amendment (“Amendment No. 1”) to the proposed rule change.<sup>3</sup> On November 9, 2011, the proposed rule change was published for

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> As provided in the instructions to Form 19b-4, the Exchange noted in Item 2 of its filing that it needed to obtain, but had not yet obtained, formal approval from its Board of Directors for the Bylaw, Certificate of Incorporation, and Voting Agreement changes set forth in this proposed rule change. The Exchange also noted that it needed to obtain, but had not yet obtained, approval from CBOE Holdings, the Exchange’s sole stockholder, of the changes to the Certificate of Incorporation and Voting Agreement. The Exchange stated that once these approvals were obtained, it would file a technical amendment to this proposed rule change to reflect these approvals. Amendment No. 1 reflected that the requisite approvals were obtained on November 1, 2011, and represented that no further action in connection with this proposed rule change was required. In addition, Amendment No. 1 contained the Exchange’s consent to an extension of time for Commission consideration of this proposed rule change for an additional thirty-five days after November 1, 2011 (the filing date of this amendment).

comment in the Federal Register.<sup>4</sup> The Commission received no comments on the proposed rule change. This order grants approval to the rule change, as modified by Amendment No. 1.

## II. Description of the Proposed Rule Change

### (a) Elimination of 30% Industry Director Requirement

Currently, the Exchange's Bylaws contain a requirement that its Board of Directors be composed of at least 30% Industry Directors.<sup>5</sup> The Exchange proposed to amend its Bylaws to eliminate this requirement. In its Notice, the Exchange said that this change was intended to give it flexibility as it evaluates the composition of its Board in the future.<sup>6</sup> C2 also proposed a conforming change to amend Section 4.4 of its Bylaws to delete the clause that requires the Nominating and Governance Committee ("NGC") to consist of both Industry and Non-Industry Directors.

### (b) Nomination of Representative Directors

Currently, the Exchange Bylaws state that at least 20% of C2's directors must be Representative Directors.<sup>7</sup> As described in Section 3.2 of the Bylaws, candidates for Representative Director positions are nominated by the Industry Director Subcommittee of the NGC.<sup>8</sup> In addition, C2 Trading Permit Holders may nominate alternative candidates (in addition to those nominated by the Industry Director Subcommittee) for election to the

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<sup>4</sup> See Securities Exchange Act Release No. 65681 (November 3, 2011), 76 FR 69783 ("Notice").

<sup>5</sup> See Section 3.1 of the Exchange's Bylaws. The term "Industry Directors" is defined in this Section.

<sup>6</sup> See Notice, supra note 4, at 69784.

<sup>7</sup> See Section 3.1 of Exchange Bylaws. The term "Representative Directors" is defined in Section 3.2 of the Exchange Bylaws.

<sup>8</sup> The Industry Director Subcommittee is composed of all of the Industry Directors serving on the NGC.

Representative Director positions via a petition process. In such case, a run-off election is held, in which C2's Trading Permit Holders vote to determine which candidates will be elected to the C2 Board of Directors to serve as Representative Directors.

As proposed, the Exchange Bylaws will continue to require that at least 20% of C2's directors must be Representative Directors. However, the Exchange proposed to amend its Bylaws to revise the nomination process for the Representative Directors. First, the Exchange proposed to eliminate the requirement in Section 3.2 that the Representative Directors must be Industry Directors to reflect the fact that the other change it proposed with respect to Industry Directors could result in the Board potentially not having Industry Directors. Second, the Exchange proposed to incorporate into the Bylaws the concept of a Representative Director Nominating Body ("RDNB").<sup>9</sup> Under proposed Section 1.1(k), RDNB would mean the current Industry Director Subcommittee of the NGC if there are at least two Industry Directors on the Exchange's NGC and would mean the Trading Permit Holders Subcommittee of the Advisory Board if the NGC has fewer than two Industry Directors. The RDNB would nominate the Representative Directors in accordance with the current provisions of proposed Section 3.2 of the Bylaws, and therefore would perform the functions currently performed by the Industry Director Subcommittee.

In addition, C2 proposed to amend Section 3.2 of the Bylaws with regard to the time period by which the Representative Director nominees are announced via circular to the Trading Permit Holders, as well as the deadline for Trading Permit Holders to nominate alternative candidates via petition, and the timing of any run-off election. C2 proposed to amend these deadlines in order to provide it with additional flexibility to complete the process for determining

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<sup>9</sup> See proposed new Bylaws definition 1.1(k) and the proposed changes to Sections 4.4 and 6.1 of the Bylaws.

nominees at an earlier point in time. The Exchange did not propose to change the timeframes between the milestones in the process. In addition, C2 intends the new timelines to allow it to synchronize the Exchange's nomination process to that of CBOE Holdings.

The NGC will continue to be bound to accept and nominate the Representative Director nominees recommended by the RDNB, provided that the Representative Director nominees are not opposed by a petition candidate. If such Representative Director nominees are opposed by a petition candidate, then the Nominating and Governance Committee shall be bound to accept and nominate the Representative Director nominees who receive the most votes pursuant to a run-off election.<sup>10</sup>

(c) Amendments Relating to the Advisory Board

Currently, Section 6.1 of the Exchange Bylaws provides that the Board may establish an Advisory Board which shall advise the Office of the Chairman regarding matters of interest to Trading Permit Holders. The Exchange proposed to amend Section 6.1 of the Bylaws to provide that the Exchange "will" (as opposed to "may") have an Advisory Board, which shall advise the Board of Directors in addition to the Office of the Chairman regarding matters that impact Trading Permit Holders. C2 also proposed to amend Section 6.1 of its Bylaws to expressly provide that at least two members of the Advisory Board shall be Trading Permit Holders or persons associated with Trading Permit Holders.

(d) Amendment to Certificate of Incorporation and Voting Agreement

Finally, C2 proposed to make conforming changes to its Certificate of Incorporation and the Voting Agreement between it and its parent company, CBOE Holdings, to replace the references to the Industry Director Subcommittee with the new term Representative Director

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<sup>10</sup> See Section 3.1 of the Exchange Bylaws.

Nominating Body. It also proposed to make non-substantive changes to the Voting Agreement.

### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>11</sup> In particular, the Commission finds that the proposed rule change is consistent with: (1) Section 6(b)(1) of the Act,<sup>12</sup> which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act; (2) Section 6(b)(3) of the Act,<sup>13</sup> which requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer (the “fair representation requirement”); and (3) Section 6(b)(5) of the Act,<sup>14</sup> in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

#### (a) Elimination of 30% Industry Director Requirement and Fair Representation

The Commission believes that the Exchange’s proposal to eliminate the requirement that its Board of Directors be composed of at least 30% Industry Directors is consistent with Section

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<sup>11</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b)(1).

<sup>13</sup> 15 U.S.C. 78f(b)(3).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

6(b) of the Act,<sup>15</sup> including Section 6(b)(3) of the Act.<sup>16</sup> Even if the Exchange's Board might not someday include directors who technically qualify as Industry Directors, or the number of such directors is otherwise reduced below current levels,<sup>17</sup> the Exchange's proposal would not impact its current process to ensure fair representation of its Trading Permit Holders in the selection of its directors and administration of its affairs as required by Section 6(b)(3) of the Act.<sup>18</sup> Specifically, at all times, at least 20% of the directors serving on the Board will be Representative Directors nominated (or otherwise selected through the petition process) with the input of Trading Permit Holders (or persons associated with Trading Permit Holders) as provided in the proposed Section 3.2 of the Bylaws.

The Commission has previously approved proposals in which an exchange's board of directors was composed of all or nearly all non-industry directors where the process was nevertheless designed to comply with the "fair representation" requirement in the selection and election of directors.<sup>19</sup>

(b) Nomination of Representative Directors and Fair Representation

As proposed, the Exchange Bylaws will continue to require that at least 20% of C2's

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<sup>15</sup> 15 U.S.C. 78f(b).

<sup>16</sup> 15 U.S.C. 78f(b)(3). This Section requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

<sup>17</sup> In the Notice, the Exchange stated that it has not made a determination as to whether it will reduce (or eliminate) the number of directors on its Board who qualify as an Industry Director and that it recognizes the importance of having directors who have industry expertise and knowledge (whether those directors are Industry Directors or Non-Industry Directors). See Notice, *supra* note 4, at 69784.

<sup>18</sup> 15 U.S.C. 78f(b)(3).

<sup>19</sup> See, e.g., Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003) (approving SR-NYSE-2003-34).

directors must be Representative Directors. However, in light of the changes that the Exchange proposed to the composition of the Board, the Exchange revised the nomination process for the Representative Directors. First, the Exchange proposed to incorporate into the Bylaws the concept of a RDNB,<sup>20</sup> which would mean the current Industry Director Subcommittee of the NGC if there are at least two Industry Directors on the Exchange's NGC or the Trading Permit Holders Subcommittee of the Advisory Board if the NGC has less than two Industry Directors. Second, the Exchange proposed to eliminate the requirement in Section 3.2 that the Representative Directors must be Industry Directors.<sup>21</sup> In addition, C2 proposed to amend Section 3.2 of the Bylaws with regard to the time period by which the Representative Director nominees are announced via circular to the Trading Permit Holders, as well as the deadline for Trading Permit Holders to nominate alternative candidates via petition, and the timing of any run-off election.<sup>22</sup>

The Commission believes that the Exchange's proposed changes to the nomination process for the Representative Directors are consistent with Section 6(b) of the Act,<sup>23</sup> including Section 6(b)(3) of the Act.<sup>24</sup> As discussed above, currently the Exchange satisfies the fair

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<sup>20</sup> See supra note 9 and accompanying text.

<sup>21</sup> In the Notice, the Exchange explained that it proposed this change because it is possible that at some point in the future C2's Board may not have Industry Directors serving on it. See Notice, supra note 4, at 69784.

<sup>22</sup> In the Notice, the Exchange explained that it proposed this change because it would provide the Exchange, the NGC, and the RDNB with additional flexibility and enable the exchange to complete the process for determining its nominees for Representative Director positions at an earlier point in time without changing the time period, as well as synchronize C2's nomination process with the nomination process of its parent company, CBOE Holdings. See Notice, supra note 4, at 69785.

<sup>23</sup> 15 U.S.C. 78f(b).

<sup>24</sup> 15 U.S.C. 78f(b)(3). This Section requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative

representation requirement by having on its Board at least 20% Representative Directors. As a result of the proposed changes to the composition of the Board, the NGC could have fewer than two Industry Directors, in which case the Industry Director Subcommittee would not be formed.<sup>25</sup> Under this scenario, the RDNB would be the Trading Permit Holders Subcommittee of the Advisory Board (consisting of at least two members who are Trading Permit Holders (or persons associated with Trading Permit Holders))<sup>26</sup> and would provide a mechanism for Trading Permit Holders to have input with respect to the nominees for Representative Directors. Pursuant to Bylaws Section 6.1, members of the Advisory Board are recommended by the NGC for approval by the Board. The proposed change leaves intact the current process to nominate and elect Representative Directors, but is intended to accommodate the need for member input in the nomination of Representative Director candidates in the event that the Board does not contain a sufficient number of Industry Directors to empanel the Industry Director Subcommittee.

Further, with respect to the proposed changes to the time period by which the Representative Director nominees are announced via circular to the Trading Permit Holders, as well as the deadline for Trading Permit Holders to nominate alternative candidates via petition, and the timing of any run-off election, the Commission believes that such changes generally preserve the current schedule with respect to the various milestones in the process, while allowing the Exchange to shift slightly the start of the process. Further, the Commission notes that the proposed provision specifically provides that “[i]n no event shall the annual meeting date each year be prior to the completion of the process for the nomination of the Representative

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of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

<sup>25</sup> See Section 4.4 of the Exchange Bylaws.

<sup>26</sup> See *infra* note 29 and accompanying text.



Directors for that annual meeting as set forth in Sections 3.1 and 3.2.”<sup>27</sup>

(c) Amendments Relating to the Advisory Board and Fair Representation

As stated above, the Exchange proposed to amend Section 6.1 of the Bylaws to provide that the Exchange “will” (as opposed to “may”) have an Advisory Board, which shall advise the Board of Directors in addition to the Office of the Chairman regarding matters that impact Trading Permit Holders.<sup>28</sup> C2 also proposed to amend Section 6.1 of its Bylaws to expressly provide that at least two members of the Advisory Board shall be Trading Permit Holders or persons associated with Trading Permit Holders.<sup>29</sup> By providing for the mandatory establishment of the Advisory Board and for the mandatory inclusion of at least two Trading Permit Holders or persons associated with Trading Permit Holders in the Advisory Board, the Exchange’s proposal is designed to facilitate the provision of input by industry members and Trading Permit Holders into the selection of its directors and administration of its affairs, consistent with Section 6(b)(3) of the Act.<sup>30</sup>

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<sup>27</sup> See Section 2.2 of the Exchange Bylaws.

<sup>28</sup> In the Notice, the Exchange explained that it recently established an Advisory Board. See Notice, supra note 4, at 69784.

<sup>29</sup> In the Notice, the Exchange noted that the Advisory Board provides a mechanism for Trading Permit Holders to provide industry feedback to C2’s Chairman and CEO, Executive Vice Chairman, President and Lead Director, all of whom are members of the Advisory Board, consistent with Section 6(b)(3) of the Act. See Notice, supra note 4, at 69784.

<sup>30</sup> 15 U.S.C. 78f(b)(3).

#### IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>31</sup> that the proposed rule change (SR-C2-2011-031), as modified by Amendment No. 1, be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>32</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>31</sup> 15 U.S.C. 78s(b)(2).

<sup>32</sup> 17 CFR 200.30-3(a)(12).